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NO. 91-1655

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH GARDNER, ROBERT L. LUCAS, LOVANA JONES, DAN BARREIRO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., BOBBY E. THOMPSON, JIM MCPIKE, JEROME JOYCE, THOMAS LYONS, ERTHARIN COUSIN, JOSEPH CONNELLY, RITA HEAD, KENNETH HEAD, GARY RESIDORI, DENNIS BOSSINGER, CHARLES GONCZY, SHERRY DENAULT, HARLEN HISER, BOB LATHAM, BOB MARTIN, HOWARD DUCHENE, CARL ERICKSON, WILLIAM PONIKVAR, GERALD BALTHAZOR, RICHARD CONNOR, MARY JANE WILKINSON, PENNY VON BERGEN WESSELS, BILL ANDERSON, CHUCK ADELMAN, JOSEPH SINKIAWIC, AND JOHN HOLUB,

Petitioners,

v.

GEORGE H. RYAN sued in his official capacity as ILLINOIS SECRETARY OF STATE, ILLINOIS STATE BOARD OF ELECTIONS, ALBERT JOURDAN, FRANK WATSON, ROBERT CHURCHILL, DALLAS INGEMUNSON, and GENE HOFFMAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF RESPONDENTS IN OPPOSITION

DAN K. WEBB
STEVEN F. MOLO *
TIMOTHY J. ROONEY
THOMAS V. SKINNER
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Attorneys for Respondents

* Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court properly approved the Illinois state legislative redistricting plan over challenges to the plan based solely on state law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
BRIEF OF RESPONDENTS IN OPPOSITION	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
REASONS FOR DENYING THE WRIT	10
I. THE ILLINOIS SUPREME COURT'S DECISION RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS	10
II. IT IS NEITHER NECESSARY NOR APPROPRIATE TO REVIEW PETITIONERS' DUE PROCESS AT THIS TIME	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases **Page**

Asarco, Inc. v. Kadish, 490 U.S. 605 (1989) 12

California v. Freeman, 488 U.S. 1311 (1989) 10, 11, 12

Chisom v. Roemer, ___ U.S. ___, 111 S.Ct. 2354 (1991) 15

Illinois v. Rodriguez, ___ U.S. ___, 110 S.Ct. 2793 (1990) 10, 12

Illinois Legislative Redistricting Comm'n v. LaPaille, 782 F. Supp. 1272 (N.D. Ill. 1992) 16

Illinois Legislative Redistricting Comm'n v. LaPaille, 1992 WL 45737 (N.D. Ill. March 11, 1992) 14

Michigan v. Long, 463 U.S. 1032 (1982) 10

People ex rel. Burris v. Ryan, 147 Ill. 2d 270, 588 N.E.2d 1023 (1991) 11

People ex rel. Burris v. Ryan, 147 Ill. 2d 270, 588 N.E.2d 1033 (1992) 11

Thornburg v. Gingles, 478 U.S. 30 (1985) 15

Uhler v. AFL-CIO, 468 U.S. 1310 (1984) 12

NO. 91-1655

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH GARDNER, et al.,

Petitioners,

vs.

GEORGE H. RYAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents George H. Ryan, in his official capacity as Illinois Secretary of State, Albert Jourdan, Frank Watson, Robert Churchill, Dallas Ingemunson, and Gene Hoffman (collectively, "Respondents[1]"), respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the January 10, 1992 Order and January 14, 1992 Opinion of the Illinois Supreme Court in this cause.

OPINIONS BELOW

The Illinois Supreme Court's December 13, 1991 Opinion is reported at 147 Ill. 2d 270, 588 N.E.2d 1023 (1991), while its January 14, 1992 Opinion is reported at 147 Ill. 2d, 588 N.E.2d 1033 (1992).

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1 The Illinois State Board of Elections, listed as one of the Defendant-Respondents in the caption of this proceeding, is not a party to this brief. However, the Board of Elections has acted as a nominal party, and did not engage in any substantive argument at any time, during the proceedings below.

JURISDICTION

Respondents agree with the Jurisdictional Statement set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 3 of the Illinois Constitution of 1970 provides:

All elections shall be free and equal.

Article IV, section 3 of the Illinois Constitution of 1970 provides:

(a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.

(b) In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.

If no redistricting plan becomes effective by June 30 of that year, a Legislative Redistricting Commission shall be constituted not later than July 10. The Commission shall consist of eight members, no more than four of whom shall be members of the same political party.

The Speaker and Minority Leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly.

The members shall be certified to the Secretary of State by the appointing authorities. A vacancy on

the Commission shall be filled within five days by the authority that made the original appointment. A Chairman and Vice Chairman shall be chosen by a majority of all members of the Commission.

Not later than August 10, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission.

Not later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

An approved redistricting plan filed with the Secretary of State shall be presumed valid, shall have the force and effect of law and shall be published promptly by the Secretary of State.

The Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting the House and Senate, which shall be initiated in the name of the People of the State by the Attorney General.

STATEMENT OF THE CASE[2]

Nature of the Case

Petitioners seek to overturn the decision of the Supreme Court of Illinois approving a plan of redistricting for the Illinois General Assembly. The approved plan of redistricting was the result of numerous hearings and debate in the General Assembly; additional hearings, debate, and public comments before the Illinois Legislative Redistricting Commission ("the Commission"), a special bi-partisan redistricting body convened pursuant to the Illinois Constitution; and extensive briefing and argument before the Supreme Court of Illinois. The procedures followed by the Illinois Supreme Court and the Commission were based upon established Illinois Supreme Court Rules or determinations by the Commission after negotiation between the parties and hearings on procedures.

The redistricting was required by article IV of the Illinois Constitution based upon the 1990 Federal Decennial Census. The Illinois Supreme Court found that the plan ultimately met the state constitutional requirements for compactness, contiguity, and substantial equality of population. The court also found specifically that the plan did not dilute the votes of minorities in violation of the free and equal clause of the Illinois Constitution.

Petitioners admit they carefully crafted their pleadings in the Illinois Supreme Court to avoid federal jurisdiction; however, the parties and the court looked to federal, as well as Illinois, case law in arguing and deciding the issues. While the Illinois Supreme Court noted that the plan met federal requirements, it specifically addressed in detail the state issues which Petitioners argued so vigorously was the exclusive basis for the relief they sought in the Illinois Supreme Court. Immediately upon receiving an adverse decision from the Illinois Supreme Court, Petitioners ran to federal court — where they had been contesting jurisdiction — and asserted Voting Rights Act claims which ultimately were litigated adverse to them as well.

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2 Pursuant to Supreme Court Rule 24.2, the Respondents hereby submit this statement of the case to correct inaccuracies and omissions in the Statement of the Case set forth in the Petition for Writ of Certiorari.

Petitioners now ask this Court to review the Illinois Supreme Court's determinations of Illinois law. Further, they challenge the Illinois Supreme Court's procedures, which they urged and followed without objection, as violations of due process.

Procedural Background

The Illinois Constitution of 1970 provides a method by which the Illinois legislative districts for the election of members of the Illinois General Assembly are to be reapportioned. Article IV, section 3 of the Illinois Constitution of 1970 requires that no later than June 30 in the year following each federal decennial census, the Illinois General Assembly by law shall redistrict the districts from which members of the Illinois General Assembly are elected. If the General Assembly fails to do so, then the Illinois Constitution provides that a Legislative Redistricting Commission shall be constituted no later than July 10 of that year.

The Commission consists of eight (8) members, of whom two (2) each are appointed by the President of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives and the Minority Leader of the House of Representatives. The Commission must file with the Illinois Secretary of State no later than August 10 a redistricting plan approved by at least five (5) members.

If the Commission fails to file an approved plan by that date, the Illinois Supreme Court must submit the names of two persons not of the same political party to the Secretary of State no later than September 1. The Secretary of State then publicly must draw by random selection one of the two names submitted to serve as the ninth member of the Commission. Not later than October 5, the Commission must file with the Secretary of State a redistricting plan approved by at least five members.

The Illinois General Assembly failed to enact a valid redistricting plan by June 30, 1991. Thus, pursuant to article IV, section 3 of the Illinois Constitution, the first eight members of the Commission were appointed. Those members included Petitioners Jerome Joyce, Jim McPike, Tom Lyons, and Ertharin Cousin, appointed by the Democratic leadership in the Illinois General Assembly, and Respondents Frank Watson, Robert Churchill, Dallas Ingemunson, and Gene

Hoffman, appointed by the Republican leadership in the Illinois General Assembly. The eight-member Commission failed to adopt a redistricting plan before the August 10, 1991 deadline.

In accordance with article IV, section 3 of the Illinois Constitution, the Illinois Supreme Court submitted the names of two persons, Al Jourdan, a Republican, and Daniel Ward, a Democrat, to the Illinois Secretary of State. On September 5, 1991, the Illinois Secretary of State publicly drew by random selection the name of Al Jourdan to serve as the ninth member of the Commission. Al Jourdan subsequently was elected to serve as Chairman of the Commission. On October 4, 1991, the Commission, by a majority vote, adopted and filed with the Illinois Secretary of State a new legislative and representative redistricting plan pursuant to article IV, section 3 of the Illinois Constitution.

On October 4, 1991, after the Commission had approved the redistricting plan, the Commission and five of its members filed suit in the United States District Court for the Northern District of Illinois, *Illinois Legislative Redistricting Commission, et al. v. LaPaille, et al.*, No. 91 C 6318 ("the Federal Action"), seeking a declaratory judgment that the Commission's redistricting plan complied with all federal and state laws. The complaint noted that there had been a history of litigation surrounding Illinois legislative redistricting as well as threats of litigation surrounding the Commission's plan, and the federal declaratory judgment action was a means of resolving the issues swiftly. Petitioners did not seek to intervene in the Federal Action in October 1991; instead, those Petitioners who were named as defendants in the declaratory judgment action sought to dismiss the federal suit. Also, they, along with other parties, sought and obtained leave of the Illinois Supreme Court to file an original action before that court to challenge on state law grounds alone the Commission's redistricting plan ("the State Court Action"). *See* Petition for Writ of Certiorari ("Petition") at 16 ("no party challenging the redistricting plan in the Illinois Supreme Court had predicated a challenge on federal law"). In a January 29, 1992 brief filed in the Federal Action, the Petitioners explained their *modus operandi* as follows:

> [Petitioners] applied in these redistricting cases the same proceedings and procedures employed in the 1971 round of redistricting, pursuant to which the Illinois Supreme Court was presented with and decided issues of state constitutional law, while the federal court retained jurisdiction over and ultimately decided issues of federal law arising out of the redistricting plan.

Counter-Plaintiffs' Response to Counter-Defendants' Motion for Summary Judgment as to Count I of Counterclaim filed January 29, 1992 ("January 29 Response") at 3, Respondents Appendix ("Resp. App.") A at A-3, 4.[3] The Federal Action continued to pend while the Petitioners and Respondents conducted the State Court Action before the Illinois Supreme Court.

On December 13, 1991, after extensive briefing and argument by both Petitioners and Respondents, the Illinois Supreme Court issued its December 13 Opinion, a copy of which is contained in the Petitioners' Appendix. That Opinion raised several questions based on state law concerning the Commission Plan and remanded the redistricting process to the Commission for further hearings for consideration of those questions. The questions concerned whether certain districts violated the Illinois Constitution's requirement of compactness and whether certain districts improperly diluted the votes of racial minorities in violation of the Illinois Constitution's requirement that all elections be free and equal. 147 Ill. 2d at __, 588 N.E.2d at 1030.

In accordance with the December 13 Opinion, the Petitioners and Respondents submitted amended redistricting plans to the Commission and those plans were filed simultaneously with the Illinois Supreme Court. The parties then filed written objections to the plans

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3 This strategy may have been based on the fact that the Petitioners, representing Democratic interests against the Republican Respondents, hoped to take advantage of the 4-3 Democratic majority on the Illinois Supreme Court. If this was the Petitioners' strategy, it failed, as a majority of the Illinois Supreme Court ultimately approved the Commission's amended plan.

which also were filed simultaneously with the Illinois Supreme Court. The Commission then held three days of evidentiary hearings, complete with expert testimony subject to cross-examination. The Commission then issued a 29 page opinion adopting the Respondents' amended redistricting plan. The plan adopted by the Commission was objectively superior to the other plans in that it achieved near perfect equality of population among districts, provided the greatest number of minority super-majority districts of any plan proposed, and scored best on several mathematical tests of compactness.

The parties submitted extensive briefs to the Illinois Supreme Court opposing or supporting the Commission decision. The entire record of the Commission's proceedings was also submitted to the Court for consideration. On January 10, 1992, the Illinois Supreme Court issued its order approving the Commission's adoption of the amended plan. The Court then followed with its January 14, 1992 Opinion explaining its January 10 Order. In discussing the four criteria by which the Court judged the competing plans, the January 14 Opinion listed three criteria clearly grounded in state law and a fourth as:

> whether the map has provided adequate representation to minorities and other special interests to satisfy various State and United States constitutional rights as well as Federal statutes, *i.e.*, racial, ethnic and gender.

147 Ill. 2d at __, 588 N.E.2d at 1035.

Having lost in the state court proceedings, on January 19, 1992 the Petitioners sought and obtained leave to file counterclaims in the Federal Action against the Commission and Respondents. The counterclaims which Petitioners filed alleged violations of the Federal Voting Rights Act, the Fourteenth and Fifteenth Amendments to the United States Constitution, and included the claim that the Illinois Supreme Court's ruling denied the Petitioners' due process rights under the Fourteenth Amendment of the United States Constitution.

On January 21, 1992, the Respondents filed a motion to dismiss or in the alternative for summary judgment against the counterclaims on the grounds, *inter alia*, that the Illinois Supreme Court's January 14 Opinion was *res judicata* on the federal law issues raised in the

counterclaims because of the reference in that opinion that the Commission's amended plan complied with federal law. In response to the Respondents' motion, the Petitioners argued strenuously to the federal court that the Illinois Supreme Court's January 10 Order and January 14 Opinion did *not* decide any federal law issues at all, and that principles of *res judicata* and collateral estoppel did not apply to the federal claims raised in their federal court counterclaim.

The federal court denied the Respondents' motion to dismiss or in the alternative for summary judgment as it pertained to the Federal Voting Rights Act claims, leaving open the issue of *res judicata*, but granted the motion to dismiss Petitioners' due process claim based on the Illinois Supreme Court's procedure because Petitioners had failed to state a claim for which relief could be granted. *Illinois Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1272, 1276 (N.D. Ill. 1992).

The federal court also granted the Petitioners' request for the appointment of a three-judge panel to hear the federal law claims of the Petitioners. Commencing on February 4, 1992, the three-judge federal panel heard testimony and argument in a five-day trial. The parties presented expert testimony and numerous exhibits, and the panel accepted the entire record before the Commission and the Illinois Supreme Court during the state court proceedings.

On March 11, 1992, the three-judge federal panel issued its decision on the merits. *Illinois Legislative Redistricting Comm'n v. LaPaille*, 1992 WL 45737 (N.D. Ill. March 11, 1992). The Court rejected the application of *res judicata* to the Petitioners' counterclaims. It considered the substantive merits of the counterclaims, and, after examining the evidence and credibility of the witnesses, found the counterclaims were without merit. The federal court therefore rejected the counterclaims challenging the redistricting plan and found that the plan met the requirements of the Voting Rights Act and the Fourteenth Amendment.

The Federal Action is still pending before the three-judge panel while the court considers certain post-trial motions, including a motion for a new trial brought by the Petitioners. The Petition for Writ of Certiorari now before this Court does not raise any issues concerning the proceedings before the federal three-judge panel.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the Illinois Supreme Court's decision upholding the Legislative Redistricting Plan was, as the Petitioners have argued in the parallel Federal Action, based on the adequate and independent state law grounds of the Illinois constitutional provisions governing redistricting. The due process claims raised in the Petition are being fully litigated before the federal court and the appropriate form of review would be on an appeal of the Federal Action.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS SUPREME COURT'S DECISION RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS

It is well established that a state court decision based on adequate and independent state law grounds does not warrant review by this Court. *Illinois v. Rodriguez* __ U.S. __, 110 S.Ct. 2793, 2798 (1990); *California v. Freeman*, 488 U.S. 1311, 1313-14 (1989); *Michigan v. Long*, 463 U.S. 1032, 1041 (1982). Supreme Court Rules 10.1(b) and (c) memorialize this principle by providing that a state court's decision must involve a question of federal law in order to justify review on a writ of certiorari. When the adequate and independent state court grounds are clear in the state court's opinion, review can be denied summarily; only if the decision "fairly appears to rest primarily on federal law" does this Court require that the state court's opinion must contain a "plain statement" that shows the state court relied on state law and precedent in reaching its decision. *Illinois v. Rodriguez*, ___ U.S. ___, 110 S.Ct. at 2798. Reference to federal law in the state court opinion which is not "interwoven" with the state law merely creates an independent alternative holding that does not justify review by this Court. *California v. Freeman*, 488 U.S. at 1314; *Michigan v. Long*, 463 U.S. at 1040.

The Illinois Supreme Court's reliance on state law in approving the Legislative Redistricting Plan is evident from the proceedings and decisions of the Illinois Supreme Court. As the Petitioners admit in

their Statement of the Case set forth in the Petition, "no party challenging the redistricting plan in the Illinois Supreme Court had predicated a challenge on federal law." Petition at 16. In the December 13, 1991 Opinion remanding the case back to the Commission for further proceedings, the Illinois Supreme Court analyzed the plan under the state law requirements of compactness, contiguity, and substantial equality of population in article IV, section 3, and the "free and equal elections" clause in article III, section 3, of the Illinois Constitution. *People ex rel. Burris v. Ryan*, 147 Ill. 2d 270, 588 N.E.2d 1023, 1028-29 (1991). The questions which the Illinois Supreme Court raised for review by the Commission concerning certain enumerated districts were phrased in terms of compliance with the state constitutional requirements of compactness, contiguity, and "free and equal" elections. *Id.* at __, 588 N.E.2d at 1030. In that December 13 Opinion, the Illinois Supreme Court also made clear that it looked to federal law only for guidance in interpreting the Illinois Constitution:

> Although this court will look for guidance and inspiration from the federal court in interpreting our State constitution, we make the final determination.

Id. at __, 588 N.E.2d at 1027. Finally, the Illinois Supreme Court's January 14, 1992 Opinion approving the Commission's amended redistricting plan specifically found that the plan satisfied the Illinois Constitution's requirements concerning substantial equality of population, adequate representation of minorities and other special interests, compactness, and political fairness. *People ex rel. Burris v. Ryan*, 147 Ill. 2d 270, 588 N.E.2d 1033, 1035-36 (1992). Given the abundance of references to state law principles in the December 13 and January 14 Opinions, it is clear that the Illinois Supreme Court's decision to approve the Commission's amended redistricting plan rested on independent state law grounds.

The reference to federal law in the January 14 Opinion which the Petitioners previously viewed as deciding no federal issues at all merely constitutes an independent alternative holding for the Illinois Supreme Court's decision upholding the Commission approved plan which does not require review by this Court. *California v. Freeman*,

488 U.S. at 1314. Nothing in the opinions suggest that the Illinois Supreme Court treated the state law issues of compactness, contiguity, substantial equality of population, or "free and equal elections" as being "interwoven" with federal law. Unlike cases in which this Court found no adequate and independent state ground for decision because the state court never mentioned the state statutes apart from federal law, *see Asarco, Inc. v. Kadish*, 490 U.S. 605, 625 (1989), or the state statutes were not even identified in the extensive discussion of federal law, *see Illinois v. Rodriguez*, ___ U.S. ___, 110 S.Ct. at 2798, the opinions of the Illinois Supreme Court in this matter contain numerous references to state constitutional principles without discussion of federal law. For example, in the December 13 Opinion the Illinois Supreme Court remanded the State Court Action to the Commission for further proceedings to consider the redistricting plan in light of questions based solely on state constitutional principles of compactness and the free and equal clause. This is consistent with Petitioners' admitted strategy to limit their state court challenge to state law grounds while leaving federal law issues for the still-pending Federal Action. The January 14 Opinion's finding that the Commission's amended redistricting plan also satisfied federal law provides an additional yet *independent* reason for approving the adoption of the plan. Remand to the Illinois Supreme Court because of some inadequacy of the decision on federal law would not alter the Illinois Supreme Court's final decision on the state law claims which Petitioners chose to present in the state court proceedings. *See California v. Freeman*, 488 U.S. at 1314; *Uhler v. AFL-CIO*, 468 U.S. 1310, 1311 (1984).

Further proof of the state law basis for the Illinois Supreme Court's decision can be found in the actions and admissions of the Petitioners themselves. As they have admitted in their Petition, Petitioners raised only state law issues in their complaints before the Illinois Supreme Court. This was consistent with their professed strategy to split federal and state law issues between the federal and state courts. Petitioners chose to leave the federal law issues for the parallel Federal Action still pending in the Northern District of Illinois and filed their substantive federal law claims in federal court *after* the Illinois Supreme Court entered its January 10 Order and January 14 Opinion. When the Commission and Respondents argued in the

Federal Action that the January 14 Opinion was *res judicata* on Petitioners' federal claims, the Petitioners specifically argued that the January 10 Order and January 14 Opinion did *not* resolve issues of federal law. In briefs filed with the three-judge panel in federal court, the Petitioners contended:

> Clearly, it was understood by all parties to the [state court] case, as of December 16, 1991, that federal law questions were not presented to or (at the very least, were not decided by) the Illinois Supreme Court.
>
> * * *
>
> To the extent that the Supreme Court approved the adoption of the Commission's plan, *that decision did not purport to adjudicate federal issues.* In asserting the basis for its acceptance of the plan, the [Illinois] Supreme Court expressly disclaimed any evaluation of any of the 'totality of the circumstances' beyond 'the statistics provided.' Not one federal authority was cited in the [Illinois] Supreme Court's January 14, 1992 Judgment, no *federal claim asserted by any intervenor was identified (nor could there have been one given the absence of any federal claims in the pleadings) and not one federal issue was involved.*

January 29 Response at 11, 16, Resp. App. A at A-12, A-16 (emphasis supplied).

Likewise, in their Petition for Rehearing filed with the Illinois Supreme Court, the Petitioners specifically argued that "[i]t is apparent to the [Petitioners] that this Court never intended to decide or undertake to decide federal claims" because, according to Petitioners, the standard applied was inappropriate for claims under the Voting Rights Act and Fifteenth Amendment and because a constitutional majority of four Justices did not join in the federal law reference in the January 14 Opinion of the Court. Petition for Rehearing at 16, 19, Resp. App. B at B-16, 19. The three-judge federal panel ultimately agreed, finding that the January 14 Opinion was not *res judicata* on the Petitioners' federal claims:

> The only constitutional or statutory standard specified in the opinion was that for reviewing the Commission's work set forth in the Illinois Constitution . . . under the circumstances, this Court cannot find that the Illinois Supreme Court's ruling precludes the federal claims at issue. It is unclear whether that court considered or made any findings with regard to the Voting Rights Act, the Fourteenth or Fifteenth Amendments. The [Commission] and Reed have failed to meet their burden to show specifically what that ruling determined. *Res judicata*, therefore, cannot be applied.

Illinois Legislative Redistricting Comm'n v. LaPaille, 1992 WL 45737 at p.*3-4 (N.D. Ill. March 11, 1992).

Thus, the Petitioners have successfully argued in the pending Federal Action that the Illinois Supreme Court did not decide issues of federal law in the January 10 Order and January 14 Opinion. Because of their success, Petitioners obtained a full trial on their federal claims in the Federal Action.

Now, however, the Petitioners seek to invoke the discretionary review power of this Court by reversing their field at the eleventh-hour. Petitioners' tactics in this regard are all the more transparent in light of Petitioners' success in the Federal Action in convincing the federal court that no federal law issues were decided so that a full trial on the merits could be held in federal court. If the Petitioners really believed that federal law issues were decided in the January 14 Opinion, they should have admitted *res judicata* and appealed the Illinois Supreme Court's decision alone. Having denied that very premise and obtained a trial elsewhere, the Petitioners should be required to accept the consequences of their strategic decision and seek this Court's review of the Federal Action when it becomes appropriate.

It should be noted that denying review of the Illinois Supreme Court decision will not prejudice the Petitioners because they have a forum for their federal law claims. Petitioners have asserted claims under the Voting Rights Act and the United States Constitution in the pending Federal Action. They have participated in a five-day trial in federal court, presenting evidence and argument (including evidence

and argument raised in the state court proceedings) in support of their federal claims. They have raised the same arguments based on *Chisom v. Roemer*, ___ U.S. ___, 111 S.Ct. 2354 (1991) and *Thornburg v. Gingles*, 478 U.S. 30 (1985) which they assert in their Petition to this Court. The disposition of these federal claims by the federal court is *not* the subject of the pending Petition for Writ of Certiorari. Petitioners can seek review of the federal law claims by a proper appeal of the Federal Action.

Indeed, given the Petitioners assertion of federal law claims and arguments in the Federal Action, it is unclear what relief this Court can award Petitioners that they have not already received — save a repetition of the already completed federal trial before the Illinois Supreme Court as opposed to a three-judge federal panel. The enormous waste of judicial resources which Petitioners' request would occasion in both this Court's review of the appeal and the Illinois Supreme Court's repetition of the federal trial are strong reasons to deny the Petition.

In sum, the reference to federal law in the Illinois Supreme Court's January 14 Opinion is merely an independent alternative holding that does not justify discretionary review by this Court. The Petitioners consciously chose to limit their claims in state court to those based on state law. They should not be allowed to obtain review of a state court proceeding decided on state law grounds merely on the basis of a reference in the Illinois Supreme Court's opinion to federal law, a reference which the Petitioners consistently have maintained was not a decision of federal law issues. The adequate and independent state law grounds for the decision of the Illinois Supreme Court justifies denial of the Petition.

II. IT IS NEITHER NECESSARY NOR APPROPRIATE TO REVIEW PETITIONERS' DUE PROCESS ARGUMENT AT THIS TIME

The second alleged basis for review asserted in the Petition is that the Illinois Supreme Court's decision to approve the Commission Plan violated Petitioners' due process rights because the Petitioners "were afforded no meaningful judicial review of the Commission's product." Petition at 25. This argument fails to justify a writ of

certiorari to review the Illinois Supreme Court's decision because it raises a matter inappropriate for review at this time.

The Petitioners did not raise any federal due process challenge to the process by which the Illinois Supreme Court reviewed the Commission's work during the pendency of the proceedings. In fact, the Petitioners played a substantial role in negotiating and defining the procedures by which the Commission considered the various redistricting proposals. Petitioners waited until *after* the Illinois Supreme Court had ruled against them to suddenly discover that the process was flawed. The failure to challenge the process earlier suggests a waiver of this argument.

Further, the Petitioners have had a full opportunity to present their legal arguments for a violation of their due process rights in the Federal Action. In fact, the Petitioners asserted the very same due process challenge alleged in the Petition in the Federal Action as Count III of their federal counterclaim. The federal court has found that this very same due process allegation fails to state a claim upon which relief can be granted. *Illinois Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1272, 1276 (N.D. Ill. 1992). That federal court process is on-going, however, and those proceedings have not yet been completed; the decision is therefore not yet ripe for this Court's review. When appropriate, Petitioners can appeal this ruling in the Federal Action.

Finally, the Petitioners have in fact been afforded "judicial review of the Commission's product." Consistent with their express intention to have the state court decide issues of state law and the federal court decide issues of federal law, the Petitioners were able to obtain a full evidentiary trial and judicial review of the redistricting plan which the Petitioners wanted reviewed. In that trial, the three-judge federal panel had an opportunity to assess the credibility of the witnesses and weigh the evidence — precisely the type of judicial review to which the Petitioners claim to be entitled. In short, reviewing the Illinois Supreme Court's decision on due process grounds would at best result in a remand to conduct precisely the types of hearing which the Petitioners already have received in federal court. The Petitioners may not like the result which they achieved in their federal trial, but that result may be appealed when appropriate. The

unmistakable conclusion, however, is that the combined federal and state court proceedings, which the Petitioners strategically viewed as linked together in this case, have given Petitioners extraordinary due process.

Thus, it is inappropriate for this Court to exercise its discretionary review power over Petitioners' due process claim at this time.

It is a far better use of discretionary judicial resources to review the due process aspects of the redistricting review process if and when the fully litigated due process claim comes before this Court on an appeal of the Federal Action. The Court should therefore deny the Petition's request for review of the due process aspects of the Illinois redistricting process.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Dan K. Webb
Steven F. Molo*
Timothy J. Rooney
Thomas V. Skinner
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel for Respondents

* Counsel of Record

APPENDICES

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE HOFFMAN, and DALLAS INGEMUNSON,	)	
Plaintiffs,	)	
vs.	)	No. 91 C 6318
GARY J. LAPAILLE, etc. et al.,	)	JUDGE NORGLE
Defendants.	)	MAG. WEISBERG

JOSEPH GARDNER, LOVANA JONES, DAN BARREIRO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their	)	

own behalf and on behalf of all others similarly situated,	)
Counter-Plaintiffs,	)
vs.	)
	)
ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE HOFFMAN, DALLAS INGEMUNSON, GEORGE H. RYAN, sued in his office capacity as ILLINOIS SECRETARY OF STATE, and ILLINOIS BOARD OF ELECTIONS,	)
Counter-Defendants.	)

COUNTER-PLAINTIFFS' RESPONSE TO COUNTER-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF COUNTERCLAIM

COUNTER-PLAINTIFFS' RESPONSE TO COUNTER-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF COUNTERCLAIM

This response is submitted by the *Gardner* counter-plaintiffs in opposition to plaintiffs/counter-defendants' motion for summary judgment as to Count I of the counterclaim, relating to the issue of *res judicata*, claim preclusion and issue preclusion. This Court, by Memorandum Opinion and Order entered January 24, 1992, dismissed Counts II and III of the counterclaim, and it denied counter-defendants' motion to dismiss Count I of the counterclaim pursuant to Rule 12(b)(6), leaving unresolved the Court's determination of whether the January 10, 1992 Order and January 14, 1992 Judgment of the Illinois Supreme Court operate, pursuant to principles of *res judicata*, as a bar to the counterclaim.

In fact, as set forth more fully below, the Illinois Supreme Court's decision in this case does not operate as a bar under *res judicata* or collateral estoppel: (1) there has been no "final" adjudication of the parties' rights in the Illinois Supreme Court, due to the fact that there remains available to the *Gardner* parties in that case an opportunity to file a Petition for Rehearing before the Supreme Court, as well as to ask the Illinois Supreme Court to withdraw its mandate both for purposes of considering the Petition for Rehearing and for purposes of filing a Petition for Writ of Certiorari with the United States Supreme Court; (2) the proceedings of the Illinois Legislative Redistricting Commission were legislative, not judicial in nature, as evidenced most clearly by Article IV, Section 3 of the Illinois Constitution, Supreme Court Rule 382(b) and the fact that the members of the Commission who exercised their legislative duties were represented by counsel for the parties advocating the specific redistricting proposals; (3) there was no presentation of "federal" claims in the pleadings presented to the Illinois Supreme Court by the *Gardner* parties or other parties in the Supreme Court, and the Supreme Court expressly declined, in its December 13 Opinion, to address or predicate its first decision and its remand order to the Commission on any issues of federal law; and (4) the *Gardner* parties applied in these redistricting cases the same proceedings and procedures employed in

the 1971 round of redistricting, pursuant to which the Illinois Supreme Court was presented with and decided issues of state constitutional law, while the federal court retained jurisdiction over and ultimately decided issues of federal law arising out of the redistricting plan. (*People ex rel. Scott v. Grivetti*, 50 Ill.2d 156, 277 N.E.2d 881, *Grivetti v. Illinois State Electoral Board, et al.*, 335 F.Supp. 779 (N.D. Ill. 1971). Further, as to the merits of counter-plaintiffs' claims, the record before the Commission and the Illinois Supreme Court does not completely address or resolve issues of fact relating to the ability of the Redistricting Commission, the Supreme Court and this Court to fashion a remedy consistent with the Voting Rights Act of 1965, as amended, with respect, specifically, to "influence" districts in Waukegan, Aurora, the northwest side of the City of Chicago and elsewhere, nor does it resolve issues relating to whether, under the "totality of the circumstances," the creation of super-majority African-American districts in the metropolitan Chicago area dilute African-American voting strength.

STATEMENT OF PROCEDURAL HISTORY

This action was filed in this Court October 4, 1991, by the five Republican members of the Commission and by the Commission itself, purporting to seek a declaration of the validity of the state-wide redistricting plan under federal and state law. At the time the action was filed, the state-wide redistricting plan approved by the Commission carried, pursuant to the Illinois Constitution (Article IV, Section 3) a presumption of validity.

In response, defendants argued, among other things, that the Eleventh Amendment to the United States Constitution foreclosed this Court from addressing, even under theories of *pendent* jurisdiction, the plaintiffs' request for adjudication of the validity of the redistricting plan under state law. The Supreme Court case upon which various defendants relied was *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984) in which the United States Supreme Court held that equitable relief could not be obtained in federal court against state officials on the basis solely of state law claims and, on principles of *pendent* jurisdiction, could not be provided even if there existed viable claims for equitable relief on the basis of federal law.

While this case was pending, the Attorney General and the *Gardner* intervenors, as well as other parties, filed actions in the Illinois Supreme Court pursuant to Article IV, Section 3 of the Illinois Constitution and Supreme Court Rule 382, challenging the validity of the state-wide redistricting plan approved by the Commission on the basis of the Illinois Constitution. When that action was improvidently removed to the District Court, the *Gardner* parties unequivocally stated that the action filed in the Illinois Supreme Court was expressly limited to grounds of state law, not federal law.

While the case was pending in the Illinois Supreme Court, specifically in connection with the reply brief filed by the *Gardner* parties November 22, 1991, the *Gardner* intervenors reiterated their contention that their claims arose under the state constitution, independent of federal statutory and constitutional grounds:

> Defendants ask this Court to hold that the claims of Illinois citizens challenging the effect of a redistricting plan, which impairs the rights of Illinois citizens to enjoy the full measure of their voting power when they exercise the right of suffrage to choose their Senators and Representatives in the Illinois General Assembly, have no place in an Illinois Court. Questions of fundamental fairness, full political empowerment, and rights of equal protection and suffrage, according to defendants, are questions properly reserved for the federal courts, and the only concern for this Court is whether the districts are "compact, contiguous and substantially equal in population." (Def. Br., p. 28). Indeed, given the clear language of Article IV, Section 3, defendants suggest that it would be "improper for this Court, in interpreting such clear language, to engraft additional requirements onto the Constitution." (*Id.*). Such concepts of vote dilution, equal voting power and the like, protections afforded in the Constitution of 1970, are apparently of no moment before this Court, which defendants seek to reduce to the sterile clerical role of counting populations and measuring square miles.

Plaintiffs absolutely reject such a notion, and they call upon this court to do the same. It is the right, the role and indeed, the duty of this Court to protect the rights of Illinois citizens from all invidious discrimination, and this Court should not hesitate to so interpret and apply the provisions of the Illinois Constitution.

As set forth more fully below, the defendants' interpretation of federal law is itself incorrect, but federal law, in any event, is only instructive, not binding upon this Court. The federal statutory and constitutional guarantees are minimum requirements, prohibiting States from affording their citizens less rights than mandated by federal law. States, however, remain free to recognize additional rights of their citizens, particularly when those rights are those defined by the People themselves, such as those in the 1970 Constitution, which, although drafted in a Convention, was considered and passed by the State electorate.

Further, in reviewing defendants' arguments, this Court is invited to hold defendants' predecessors—the Republican members of the Illinois House Reapportionment Committee—to the standards which they willingly and unequivocally recognized just five months ago. Finally, despite the denials throughout this section of their brief, defendants ultimately and inexorably must return to the issue of maximizing minority political strength. Although defendants rely on *Hastert v. State Board of Elections*, 1991 WL 28-185, p. 9, of the United States District Court for the Northern District of Illinois, decided November 6, 1991, involving the Illinois Congressional Districts and now suggests the absence of any constitutional or statutory right to an apportionment structure designed to maximize political strength of minorities, the question ultimately reduces itself, as defendants themselves appear to acknowledge, to that very principle. Indeed, defendants' final words on the question of minority vote dilution offer a paraphrasing

of defendants' retained expert, who concludes that the Jourdan II or Commission Plan "maximizes minority voting strength." (Def. Br., p. 52).

One can only wonder why, given the recognition of the House Reapportionment Committee in June 1991, and the final concession that the issue is maximization of minority voting strength, defendants would devote more than a quarter of their brief to an effort to deny what is plainly before them. No amount of rhetoric, no amount of federal law citation, (however inaccurate or inapposite), and no amount of denial of the ability of a significant and cohesive minority to influence the results of an election and compel political allegiance to minority causes on the part of elected officials can shield this Plan from the light of this Court's required security.

The *Gardner* plaintiffs do not advocate a strained or novel view of Illinois law. All citizens in this State are constitutionally guaranteed the right of suffrage. All citizens are entitled to equal protection, and all citizens are entitled to free and equal elections. Finally, all citizens are entitled to be served by Legislative and Representative Districts which are compact, contiguous and of substantially equal population.

* * *

The *Gardner* plaintiffs agree that they have asserted no claims for relief under the federal Voting Rights Act, 42 U.S.C. § 1973. They agree further that the cases construing the Voting Rights Act might provide assistance to this Court when it construes the Illinois Constitution.

November 22, 1991 Brief of *Gardner* intervenors before the Illinois Supreme Court, pp. 20-22; 30.

The Illinois Supreme Court, in its December 13, 1991 Opinion, agreed. The Court expressly denied to apply this Court's recent decision in *Hastert v. State Board of Elections*, (N.D. Ill. Nov. 6,

1991), Nos. 91—C—4028, 91—C—4154, 91—C—4656, 91—C—5474 cons.), choosing, instead, consistent with Illinois precedent, to construe its constitutional provisions independently: "Although this Court will look for guidance and inspiration from the Federal court in interpreting our State constitution, *we* make the final determination. [Citing *Rollins v. Ellwood*, 141 Ill.2d 244, 275 (1990)]. In line with that holding, we do not adopt the recent opinion of the Federal court in *Hastert v. State Board of Elections* (N.D. Ill. Nov. 6, 1991) Nos. 91—C—4028, 91—C—4154, 91—C—4643, 91—C—4656, 91—C—5472 cons.)." (*Burris v. Ryan*, December 13, 1991, Slip Op., pp. 7; emphasis added).

Further the Illinois Supreme Court, in its December 13, 1991 Opinion, expressly withdrew the constitutionally stated presumption of validity which attaches to redistricting plans approved by a majority of the Commission, holding that the process by which the Jourdan II Plan had been adopted was "so completely at variance with the constitutional mandate" as to preclude the Court from "recognizing as valid a product formulated" by virtue of that process. (*Burris v. Ryan*, December 13, 1991 Slip Op., pp. 10-11 (quoting *People ex rel. Scott v. Grivetti* (50 Ill.2d 156, 165 (1971)).

Addressing the Illinois Constitutional requirements, the Supreme Court declined to reach the issue "regarding the constitutional validity of the plan as a whole, [but] we do find certain districts do not appear to meet the constitutionally mandated requirements." (*Burris* Slip Op., pp. 11-12). In remanding the cause to the Commission for development of an appropriate map meeting "the constitutionally mandated requirements," the Court directed the Commission to address three questions at the Court-ordered hearing, as they related to specifically enumerated Senate and House Districts:

1. Compactness:

> Do the following districts violate *article IV of the Illinois Constitution for 1970*, which provides that all districts be drawn in a compact and contiguous manner? Is there a justifiable, neutral reason for any of the below configurations?

Senatorial District	House Districts
7	14
10	19
11	21
18	
24	47
34	
37	73
38	75
53	
54	

2. Compactness and Racial Dilution:

Do the following districts violate article IV, section 3, *of the Illinois Constitution of 1970*, which provides that all districts be drawn in a compact and contiguous manner? Do the following districts violate *article III, section 3, of the Illinois Constitution of 1970*, which provides that all elections be free and equal? Is there a justifiable, neutral reason for any of the below configurations?

Senatorial District
6
36
44
51
52
56
57

3. Racial Dilution:

Do the following districts violate *article III, section 3 of the Illinois Constitution*, which provides that all elections be free and equal?

Senatorial District	House District
21	5 and 6
29	8
33	10
39	25 and 26
42	27 and 28
43	32
50	59
	61 and 62.

The Commission is not precluded or limited to considering other Senatorial or House districts in addition to those listed above.

Burris, Slip Op., pp. 12-13; emphasis added. Finally, the Court retained jurisdiction of the case pending completion of the Commission's process and the development of a state-wide redistricting plan:

> This Court retains jurisdiction over all motions still pending until this court has reached a final decision in this matter. This court shall retain jurisdiction of this cause until the Commission submits an approved map in line with this opinion and guidelines offered in *Hastert*. See *Schrage*, 88 Ill.2d at 105.

Id., p. 15. The reference by the Court to *Hastert* referred to the procedures employed by this Court in that case, not to the substance of the Court's Opinion, which the Supreme Court expressly declined to follow.

Significantly, in response to the Supreme Court's Opinion, the Commission came to this Court and asserted that the Supreme Court's Opinion gave rise to issues of federal law: "Serious federal rights are at issue and plaintiffs as well as all Illinois voters stand to be irrepa-

rably harmed by their deprivation if this court does not act and adjudicate this matter." (December 16, 1991 Emergency Motion for Leave to file Third Amended Complaint and for Immediate Hearing on Third Amended Complaint, pp. 4, 5(¶ 7).)

In the proposed Third Amended Complaint, the Commission alleged (¶45(g)) that "the Supreme Court order fails to provide any substantive legal analysis of the issues of law submitted to the Illinois Supreme Court regarding the applicability of federal Voting Rights Act requirements or the compactness standard under Illinois law, or regarding whether Illinois law differs at all from federal law on the issue of racial vote dilution or minority fracturing." In paragraph 51(e), the Commission and plaintiff David Reed alleged "the failure to approve the Commission Plan because of the *elevation of the state compactness standard over the federal Voting Rights Act* has violated plaintiff Reed's right to vote under the fourteenth and fifteenth amendments and the Voting Rights Act."

In its Memorandum in support of its Motion for Temporary Restraining Order and Preliminary Injunction on the Third Amended Complaint, also filed December 16, 1991, the Commission stated as follows:

> The Supreme Court Order elevated the state constitutional standard of compactness above federal statutory and constitutional standards. In effect, the Supreme Court Order forces the Commission to apply an inconsistent state law rule in lieu of applicable federal standards in violation of the Supermacy Clause of the United States Constitution.
>
> Federal law in the area of voting rights is substantial. It includes decisions involving the fourteenth and fifteenth amendments to the United States Constitution. Federal law has become even more predominant because of the strict requirements imposed by the 1982 amendment to the federal Voting Rights Act. Because of the Supermacy Clause of the United States Constitution, these federal requirements all have a direct and

> controlling impact on how the compactness requirement of the Illinois Constitution is applied.
>
> . . . Here, *the Illinois Supreme Court failed to consider the defendants' arguments that the compactness requirement of the Illinois Constitution is subservient to the federal Voting Rights Act. The Illinois Supreme Court completely ignored any discussion of federal law principles*, holding instead that "[t]he initial concern is drawing a district map which is compact." Order at 8. This requirement that compactness controls over federal voting law violates the Supremacy Clause.

Clearly, it was understood by all parties to the case, as of December 16, 1991, that federal law questions were not presented to or (at the very least, were not decided by) the Illinois Supreme Court.

On January 4, January 5 and January 6, 1992, competing plans were presented to the Commission. Advocates of the remedial plans were the Republican members of the Commission, represented by the same counsel who represent the Commission and its Republican members in this Court, and the *Gardner* intervenors, whose counsel also represented the Democratic Party members of the Commission. Indeed, the plan advocated to the Commission by the Republicans and subsequently adopted by the Commission bore the name of the Chairman of the Commission, Al Jourdan.

It would, obviously, have been entirely inappropriate, had it been a judicial proceeding, for the attorneys for the adjudicators to serve as the advocates before the adjudicative body, and it is clear that the proceedings of the Commission were legislative in nature. Although evidence was presented and cross-examination was available, the role of the Commission was to develop a state-wide redistricting plan, and to approve such a plan by January 6, 1992. The Supreme Court's January 14, 1992 Judgment concedes as much, when it states, at page 4 thereof, that "the adoption by this court of one of the plans submitted by either party would actually be a reflection on legislative policy choices."

Nevertheless, the Supreme Court formally approved and declared valid the Jourdan III Plan, stating, as follows: "However, the

Commission map meets all four requirements. In finding thus, we did not judge the credibility of each expert, rather relied on the statistics provided." (*Burris v. Ryan*, January 14, 1992 Slip Op., p. 4). The Court decided that the mandate of the Court issue "forthwith." (*Id.*).

The *Gardner* intervenors, as they have advised this Court, intend to petition the Supreme Court for rehearing and, in connection therewith, intend to present a motion to the Supreme Court pursuant to Supreme Court Rules 367 and 368 to recall the Court's mandate. The impact of Supreme Court Rules 367 and 368 will be discussed in more detail below.

STATEMENT OF FACTS RELATING TO MINORITY INFLUENCE DISTRICTS AND "CONTROL" DISTRICTS

Attached to this response as Exhibit A is the affidavit of Timothy D. Mapes, an employee of the staff of the Speaker of the Illinois House of Representatives, and one of the primary participants in the development of redistricting plans on behalf of the Democratic members of the Commission. In his affidavit, Mr. Mapes presents this Court, at the very minimum, with minority "influence" districts in Waukegan, Aurora and on the northwest side of the City of Chicago which, even under Professor Engstrom's analysis, constitute "influence" districts protectable under the Voting Rights Act. In addition, Mr. Mapes' affidavit establishes for this Court that those identified "influence" districts, and we submit there are more, can be accommodated within the Jourdan III Plan, as amended, with minimal impact upon additional districts. The Court, in providing a remedy, can order the redrawing of district lines in those areas, individually or collectively, without requiring revisitation of the entire state-wide redistrict plan.

In addition, the 16 super-majority African-American districts - in which African-Americans will, in our view, be given a fair opportunity to control elections and elect candidates of the communities' choice notwithstanding substantial white opposition bloc voting - can be drawn and can be synthesized into the remainder of the Jourdan III Plan, as amended.

At trial, the *Gardner* counter-plaintiffs will also present the expert testimony of Mr. Kimball W. Brace, who has testified before

this Court previously both with respect to the City of Chicago ward redistricting and the Illinois Congressional redistricting case of 1991. Mr. Brace's testimony is expected to support the testimony of Mr. Mapes as it relates to these districts, and it is expected to support the testimony of Professor Oden before the Commission.

For the convenience of this Court, the affidavit of Professor Oden before the Illinois Legislative Redistricting Commission is also enclosed as Exhibit B. That affidavit establishes that there is, at minimum, a genuine issue of material fact with respect to whether the Jourdan III Plan properly protects the statutory rights of African-Americans in the City of Chicago or whether, as we contend, the plan illegally dilutes African-American voting rights.

In that regard, the Court's Opinion of today's date recognizes that, under *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991) (three-judge panel), and the Supreme Court's decisions in *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), and *Chisom v. Roemer*, ____ U.S. ____, ____ L.Ed2d _____, 111 S.Ct. 2354 (1991), a dilution claim can be asserted with respect to both "influence" and "control" districts. The federal cases construing the Voting Rights Act are discussed more fully below.

RES JUDICATA/ISSUE PRECLUSION

In *Washington v. Groen Division/Dover Corporation*, 634 F.Supp. 819 (N.D. Ill. 1986), this Court identified the "traditional prerequisites" to the application of *res judicata*:

> The traditional prerequisites to the application of *res judicata* are "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Lee v. City of Peoria*, 685 F.2d 196, 199 (C.A. 7 1982).

685 F.Supp. at 821. In this case, there has been no "final" decision of the Illinois Supreme Court, the underlying proceedings before the Commission were legislative, not judicial in nature, and there is not an "identity" of causes of action in the state court and this Court.

The Absence Of A Final Decision

As to the first point, the Supreme Court issued its order January 10, 1992 and its Judgment explaining that order on January 14, 1992. Under the Supreme Court Rules, specifically Rules 367 and 368, the *Gardner* intervenors enjoy the right to petition the Supreme Court for rehearing at least until January 31, 1992: "A petition for rehearing may be filed within 21 days after the filing of the opinion, unless on motion the time is shortened or enlarged by the court or a judge thereof." (Illinois Supreme Court Rule 367(a), Ill.Rev.Stat., ch. 110A, ¶ 367(a).)

Supreme Court Rule 368 specifically permits the recall of a mandate by order of the Court. That ability of the Supreme Court to recall its mandate extends not only to the mandate issued by the Appellate Court but, as well, "in cases in which review by the Supreme Court or the United States may be sought, the court whose decision is sought to be reviewed or a judge thereof, and in any event the Supreme Court of Illinois or a judge thereof, may stay or recall the mandate, as may be appropriate." (Illinois Supreme Court Rule 368(c), Ill.Rev.Stat., ch. 110A, ¶ 368(c).) Finally, Supreme Court Rule 382, which governs state constitutional challenges to the state-wide redistricting plans provides that, upon acceptance of the case by the Supreme Court, "the case shall proceed in the manner ordered by the court." Supreme Court Rule 382(b), Ill.Rev.Stat., ch. 110A, ¶ 382(b). Nothing in Supreme Court Rule 382 forecloses the Court from recalling its mandate to accommodate petitions for rehearing, if necessary.

As such, there being an opportunity left for the *Gardner* intervenors to petition the Supreme Court to address the issues raised in the Opinion which were not fully litigated, the decision of the Supreme Court is far from final, and as counsel for the *Gardner* counter-plaintiffs advised this Court in open court January 24, 1992, it is the intention of the *Gardner* intervenors to move the Supreme Court to recall its mandate and to rehear the case.

Legislative, Not Judicial Action

Further, the Commission is itself a legislative body, and the actions of the Commission were legislative, not judicial. The Supreme Court recognized as much and went so far as to state that any

endorsement of either plan by the Supreme Court would involve legislative determinations. Clearly, the role of the Commission was not adjudicative but was, instead, legislative in nature, and principles of *res judicata* apply only to prior adjudications.

To the extent that the Supreme Court approved the adoption of the Commission's plan, that decision did not purport to adjudicate federal issues. In asserting the basis for its acceptance of the plan, the Supreme Court expressly disclaimed any evaluation of any of the "totality of the circumstances" beyond "the statistics provided." Not one federal authority was cited in the Supreme Court's January 14, 1992 Judgment, no federal claim asserted by any intervenor was identified (nor could there have been one given the absence of any federal claims in the pleadings) and not one federal issue was expressly resolved.

Moreover, the pendency of this action in this Court during the time the Supreme Court exercised its jurisdiction completely compels rejection of the *res judicata* doctrine as it relates to federal issues. When this Court denied the motions to dismiss the third amended complaint at least inasmuch as it related to plaintiff Reed, the Court implicitly recognized that, until the Supreme Court and the Commission approved a state-wide redistricting plan, there was no electoral scheme, device or plan in place in the State of Illinois which gave rise to a federal issue. It would only be upon enactment of a state-wide redistricting plan that federal claims would even ripen, since, until the state-wide plan were adopted, there was no electoral scheme, device or plan which would impact on the March 17, 1992 primary election or subsequent elections.

That very point was asserted by the Democratic members of the Commission early on in these proceedings, in connection with their motions to dismiss the original complaint and the plaintiffs' efforts to broaden the case prior to the Supreme Court's decision to include additional parties.

Identity of Actions

Finally, the causes of action asserted are not identical. First, the cause of action originally asserted in the Supreme Court related to the October 4, 1991 redistricting plan approved by the Commission. In that action, the *Gardner* intervenors successfully challenged the con-

stitutionality of the process employed by the Commission, which challenges resulted in a holding by the Supreme Court that the Commission map — the Jourdan II Plan — no longer enjoyed a constitutional presumption of validity. Thereafter, the Commission was charged with development of a remedial redistricting plan consistent with the Illinois Constitution. That charge did not involve an adjudication of federal Voting Rights Act or federal constitutional claims.

The Supreme Court expressly recognized as much when, in its December 13, 1991 Opinion, it declined to follow this Court's *Hastert* Opinion, reserving to itself right and duty to interpret the Illinois Constitution, and directed the Commission, on remand, to address specific questions relating to the Illinois Constitution without reference to federal statutory or constitutional provisions. The issues before the Commission related to the "compactness" and the "free and equal" provisions of the Illinois Constitution of 1970 and the presentation of proof and argument relating to those constitutional provisions.

The absence of an identity of causes of action is best exemplified by these plaintiffs' persistent efforts to maintain this case before this Court. These plaintiffs went so far as to seek to enjoin the Supreme Court proceedings in order to preserve what were asserted to be federal statutory and constitutional rights.

In any event, there is no question but that the entire litigation strategy of these plaintiffs before this Court was to preserve a forum to which these plaintiffs could come upon completion of the state court proceedings to assert federal challenges to the final state decision. Otherwise, if the Supreme Court of Illinois were truly charged with adjudication of federal issues and was believed by the parties to be adjudicating federal issues such that the state court proceedings would have *res judicata* effects regardless of which party prevailed, there would have been no need to maintain this lawsuit in this forum, nor would there have been a basis to seek an injunction of further proceedings before the Supreme Court.

As to the identity of the causes of action, this Court has previously held, citing precedent from the Seventh Circuit, that the test is whether the two causes of action arise out of the same "core of operative facts," meaning that "if the same facts are essential to the

maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted, and *res judicata* bars the latter action." *Lipsey v. Chicago Cook County Criminal Justice Commission*, 638 F.Supp. 837, 838 (N.D. Ill. 1986) (quoting *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982)).

Here, the same evidence is not necessary to sustain causes of action under the Illinois Constitution and under the federal Voting Rights Act. First, defendants maintained that the "free and equal" clause, which the Supreme Court had previously recognized to be "parallel" to the Fourteenth Amendment, required proof of a discriminatory intent, while the Voting Rights Act requires no proof of intent.

Second, the "free and equal" clause does not depend upon the Voting Acts Right criteria announced in *Thornburg v. Gingles* and subsequent cases, and the Supreme Court expressly refused to adopt the substantive holding of this Court in *Hastert*. Thus, the Illinois Supreme Court, in its December 13, 1991 Opinion, expressly identified a divergence in the proof required under federal and state law as well as the criteria to be employed under those doctrines.

Further, review of the Supreme Court's Judgment makes clear that the Supreme Court did not even purport to apply the standards of review under federal law. It stated that its decision was predicated solely upon the "statistics" presented to the Commission, and there was not even a pretense of an examination of the "totality of the circumstances" as mandated by Congress and the Supreme Court. That express disclaimer reveals that the Illinois Supreme Court did not view the evidence required under the Voting Rights Act as necessary to adjudicate the sufficiency of the redistricting plan, and the federal claims do not arise out of the same "operative facts" or same "evidence" as the state law claims.

Collateral Estoppel

Collateral estoppel relates to the ability of litigants to contest in a subsequent proceeding the findings of fact actually adjudicated and resolved in a prior proceeding. In this case, there has been no adjudication of the facts contested. First, as set forth above, the Commission proceedings were not adjudicative but the legislative proceedings, albeit with the benefit of testimony, cross-examination

and submissions of the proponents of the redistricting plans as to the meaning and input of testimony presented.

That having been said, however, it does not mean that the Commission's work was an adjudicative function. It is not at all unusual for legislative committees to hold fact-finding hearings, to issue minority reports in opposition to the recommendations of the majority members of the Committee, to issue Committee reports on the basis of testimony presented to the legislative committees or to examine witnesses before the Committees through questions either from the Committee members or from counsel to the Committee.

That is, essentially, what happened on January 4, January 5 and January 6, 1992. The Commission met as a deliberative, legislative body and it approved a redistricting plan purportedly in accordance with the requirements of Article IV, Section 3 of the Illinois Constitution.

There being no litigation or evidentiary hearing, there were no findings of "fact" giving rise to collateral estoppel. Indeed, (1) the Supreme Court expressly disclaimed any intent or ability to hold an evidentiary hearing, (2) the Commission ran to this Court on December 16, 1991, to complain of that fact, (3) the *Gardner* Intervenors filed an emergency motion with the Supreme Court on December 17, 1991 to amend its order to hold an evidentiary hearing and (4) that emergency motion was denied by the Illinois Supreme Court December 24, 1991. Clearly, the Supreme Court's December 13, 1991, Opinion contemplated no contested evidentiary hearings before the Court or in a judicial setting.

Supreme Court Rule 382 represents a model of judicial flexibility. The Rule reserves to the Supreme Court the highest degree of flexibility imaginable to accommodate the State constitutional challenges to redistricting plans. One of the few instances in which the Rule speaks specifically to the requirements of how proceedings shall go forward relates to the Rule's statement of procedure for resolving contested issues of fact:

> The Court may dispose of the case on the papers filed or may order further briefing or may order oral argument on the motion for leave to file or on the complaint or on the pleadings or on the pleadings supplemented by per-

> tinent documentary evidence, or may call for additional evidence and for briefs and argument after such evidence has been received. *If the Court determines that disputed issues of material fact must be resolved on the basis of oral testimony, it may appoint a judge or retired judge of any Illinois Court to take testimony and report his findings of fact and recommendations to the Supreme Court.*

Ill. Rev. Stat., ch. 110A, ¶ 382(b). The Supreme Court's Rule mandates that a contested evidentiary hearing, in a judicial setting, be conducted before an Illinois Judge, or obviously, the court as a whole. Nothing in the Rules speaks to the ability of the Court to convene the Commission as an adjudicative body to take testimony, receive evidence and adjudicate facts.

Under the circumstances, there is absolutely no basis in the law to suggest that issues of fact were adjudicated either by the Commission or by the Illinois Supreme Court under its Rules and procedures. Instead, all that happened is that the Illinois Supreme Court determined that "statistical" evidence supported the plan approved by the Commission, expressly disclaiming any reliance or evaluation of the credibility of the expert witnesses who testified. Collateral estoppel does not apply.

The Rooker-Feldman Doctrine

Counter-Defendants contend that the counterclaims should be dismissed because this Court lacks subject matter jurisdiction to entertain those claims under the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine stands for the proposition that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *District Court of Columbia Court of Appeals et al. v. Feldman, et al.*, 460 U.S. 462, 482 (1983). Counter-Defendants base their entire argument upon their characterization of the counterclaims as "an infirm attempt to appeal the Illinois Supreme Court's decision to this Court." (Counter-Defendant's Memo., p. 16). Reliance on the *Rooker-Feldman* doctrine is misplaced.

As set forth above, Counter-Plaintiffs' counterclaim does not raise the *same* issues nor claims where were litigated in the state court

proceedings. "Quite simply, there has been no state court judgment on the issues presented in this case. Thus, adjudication of this controversy cannot in any way be viewed an 'appellate review' of the correctness of some state court judgment." *Lemon v. Tucker*, 664 F.Supp. 1143, 1148 (N.D. Ill. 1987). Counter-Plaintiffs do not seek an appeal here of the Illinois Supreme Court's ruling, but they do note the irony of Counter-Defendant's assertion of the claim in view of their December 16, 1991 emergency pleadings before this Court.

Issue preclusion or "Collateral estoppel will prevent the relitigation of an issue when four requirements are met: (1) the party against whom collateral estoppel is asserted must have been fully represented in the prior litigation; (2) the issue sough to be precluded must be identical to an issue involved in the prior litigation; (3) the issue must have been actually litigated and decided on the merits in the prior litigation; and (4) the resolution of that issue must have been necessary to the court's judgment. [Citations omitted]." *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989).

Counter-Defendants as the proponents of collateral estoppel here have the burden of establishing the elements described above. *Folsom v. Continental Ill. Nat. Bank & Trust Co.*, 633 F.Supp. 178, 181 (N.D. Ill. 1986). In light of the foregoing, Counter-Defendants have failed to meet their burden.

Even if the Counter-Defendants "established an issue was raised, argued and necessarily decided in a prior proceeding, '[r]edetermination of the issues [may be] warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in the prior litigation.' [Citation omitted]." *Folsom*, 633 F.Supp. at 181. If this Court concludes that Counter-Defendants have met their burden, it is without question that a redetermination is warranted in light of the "process" that led the Supreme Court to enter a judgment approving the Jourdan III-A Plan and the judgment itself. The process employed here was fatally flawed in that the Commission failed to conduct hearings when appropriate and failed to provide meaningful public input and debate on the merits of state-wide redistricting plans. Moreover, the effect of the Commission's delay of litigation filed pursuant to Article IV, Section 3 of the Illinois Constitution to test the legitimacy of the redistricting plan was to deny Counter-Plaintiffs due

process of law, in that Counter-Plaintiffs were denied a fair and appropriate opportunity for a judicial hearing on the merits of the state-wide redistricting plan ultimately approved by the Commission and the Supreme Court or a meaningful ruling by the Supreme Court as to the merits of that redistricting plan.

Under Illinois law, *res judicata* does not apply. Illinois courts in deciding whether two suits involve the same cause of action look either to the proof required in each suit or the factual setting in which each suit arises. *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925, 856 F.2d 931 (7th Cir. 1988). In terms of the second element, *LaSalle National Bank* suggests that in determining whether *res judicata* applies, the analysis should "focus... on a comparison of the factual undergirding of the two cases at issue." *LaSalle National Bank*, 856 F.2d at 933.

The *LaSalle National Bank* court explained that the term "closely related matters" is extracted from two corollaries of fundamental importance to the *res judicata* doctrine. In quoting from *Hagee v. City of Evanston*, 729 F.2d 510, 514 (7th Cir. 1984), the *LaSalle National Bank* court stated:

> First is the rule that a party may not maintain two suits based on the same set of facts by simply expediency of limiting the theories of recovery advanced in the first.
>
> The second rules is that a party may not maintain two suits based on the same facts simply be altering the claim for relief from one suit to the next.
>
> It is important to note that both these corollaries rely on the premise that the two suits in question were based on the same set of facts.

LaSalle National Bank, 856 F.2d at 933.

VOTING RIGHTS ACT

The *Gardner* counter-plaintiffs disagree with the plaintiffs' construction of the Voting Rights Act. For example, *Thornburg v.*

Gingles, 478 U.S. 30, 47 (1986), did not foreclose the possibility of Voting Rights Act protection for "influence" districts. The Court's statement as to the essence of a "§ 2 claim" is specifically limited to a § 2 claim "in which the plaintiffs alleged and attempted to prove that their ability *to elect* representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections." (478 U.S. at 46-47, n. 12; emphasis in original). The Supreme Court's statement as to the essence of a "§ 2 claim" must be read with the limitations set forth in the footnote which preceded the text.

As read, § 2 clearly is not limited to those instances in which a minority group can establish that it has the ability "to elect" the candidate of the community's choice. Indeed, the Supreme Court specifically declined the opportunity to define the limits of a cause of action brought under § 2 relating to "influence" district. Even in *Hastert*, *supra*, the court specifically agreed that *Gingles* "has not foreclosed an extension of Voting Rights Act protection to groups unable to constitute a majority in a properly drawn single-member district." (*Hastert*, Slip Op., pp. 40-41).

The misconstruction of *Gingles* underlies the Commission's entire Voting Rights analysis. Stated simply, the Commission asserts that, unless a majority group could elect a candidate of its choice by virtue of its majority status within an elective district, the courts need never concern themselves with vote dilution claims relating to those minorities, regardless of the political realities attendant to that elective district or the political power which those minorities could otherwise wield given the circumstances relating to that district.

The Congress of the United States explicitly directed the courts to review the "totality of circumstances" when determining whether racial or language minority members have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). *Gingles*, moreover, embraced and adopted the "totality of circum-

stances" analysis. 478 U.S. at 43. There is no reconciliation of the "totality of circumstances" mandate with the Commission's putative "bright line" test, which the Supreme Court specifically refrained from applying to "influence" districts. The mandate from Congress to the federal courts under federal law was to consider the "totality of circumstances" in determining whether minority voting influence had been diminished so as to deny minorities a fair and equal opportunity to participate in the electoral process and elect candidates, but the Commission has urged the courts to view the congressional mandate more narrowly, ignore the "totality of circumstances" and focus, instead, upon one numerical measurement.

The Supreme Court, subsequent to *Gingles*, made clear that § 2(b) of the Voting Rights Act was intended to apply to influence cases. In *Chisom v. Roemer*, ___ U.S. ____, ____ L.Ed.2d ____, 111 S.Ct. 2354 (1991), the Court construed § 2 of the Voting Rights Act in connection with judicial elections. Specifically, the Court construed the language in § 2(b) relating to minorities having "less opportunity than other members of the electorate to participate in the electoral process *and* to elect representatives of their choice." (42 U.S.C. § 1973(b) (emphasis added)). The Court, in its majority opinion, held that a plaintiff must prove both a denial of the opportunity to participate and an abridgment of the opportunity to elect representatives of the minorities' choice in order to prevail under § 2. 111 S.Ct. at 2365.

In dissent, Justice Scalia criticized that construction, suggesting that "if both conditions must be violated before there is any § 2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis elect representatives of their choice' would be entirely without section 2 protection." 111 S.Ct. at 2371 (Scalia, J., dissenting). The majority addressed Justice Scalia's dissent, and, in so doing, put to rest any suggestion that an "influence" case is not cognizable under § 2:

> The dissent argues that our literal reading of the word "and" leads to the conclusion that a small minority has no protection against infringements of its right "to participate in the political process" because they will always lack the numbers necessary "to elect its candidate," *Post* at 2371. This argument, however, rests on

> the erroneous assumption that a small group of voters can never *influence* the outcome of an election.

111 S.Ct. at 2365, n. 24 (emphasis added). That decision of the Supreme Court, issued June 20, 1991, stands as an explicit recognition that "influence" districts are subject to review under the Voting Rights Acts and that minorities in an "influence" district are entitled to protection under federal law. In fact, it is apparent that it was the unanimous view of the Supreme Court that "influence" districts should be read as cognizable under the Voting Rights Act. The dissent criticized the majority's decision because, in the dissent's view, it might lead to a construction excluding "influence" districts from the scope of the Act, while the majority rejoined by pointing out that the dissent read on a false premise and that "influence" districts were not excluded by the majority's opinion.

Subsequent to the *Chisom* decision, the United States District Court for the Northern District of Ohio explicitly held that influence districts are protected under the Voting Rights Act. In *Armour v. State of Ohio*, No. C 88-1104 Y (N.D. Ohio, September 4, 1991), the Court traced the history of § 2 of the Voting Rights Act from the United States Supreme Court's decision in *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980), to the 1982 amendments to § 2 and, finally, to *Chisom*. In doing so, the Court discussed *Gingles*, Justice Scalia's dissent in *Chisom* and the Majority's rejoinder in footnote 24 of *Chisom*, and it addressed racial gerrymandering claims involving districts with less than a majority of the electorate being members of minority groups:

> While the bright-line test advocated by the defendants would indeed be [sic] simpler than a case by case analysis of the totality of the circumstances,
>
> > [t]he standard that should be applied in litigation under section 2 is not at issue here. Even if serious problems lie ahead in applying the totality of the circumstances described in section 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the

> coverage of the broadly worded statute, as enacted and amended by Congress.
>
> [Quoting *Chisom*, 111 S.Ct. at 2368].

(*Armour*, Slip Op., p. 15). *Armour* follows and is entirely consistent with *Gingles* and *Chisom*.

CONCLUSION

For these reasons, counter-plaintiffs pray that counter-plaintiffs' motion be denied.

One of the Attorneys for Counter-Plaintiffs Joseph Gardner, Lovana Jones, Dan Barreiro, William Shephard, Jr., John Lee Johnson, Gwendolyn Scott, Laura Barth, Warren Dorris, Marvin French, Jayme Cain, Percy Conway, Joseph Belman, Luis Albarasin, Crotis Teague, Jr., Henry Landrau, Carolyn Toney, Fred Smith, Charlie Wilson, Jr. and Bobby E. Thompson

WILLIAM J. HARTE
STEPHEN L. GARCIA
COURTNEY C. NOTTAGE
William J. Harte, Ltd.
111 West Washington Street
Suite 110
Chicago, IL 60602
(312) 726-5015

JOSEPH E. TIGHE
111 West Washington Street
Suite 1100
Chicago, IL 60602
(312) 641-0881

ROBERT L. TUCKER
Robert L. Tucker & Associates
203 North LaSalle Street
Suite 2100
Chicago, IL 60601
(312) 558-1588

Appendix B

No. 72662

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ROLAND W. BURRIS, ILLINOIS ATTORNEY GENERAL,	)
Plaintiff,	)
JOSEPH GARDNER, *et al.*,	)
Intervenor-Plaintiffs,	)
vs.	)
GEORGE H. RYAN, etc., *et al.*,	)
Defendants.	)

Original Proceedings Before The Illinois
Supreme Court Pursuant To Article IV,
Section 3 of the Illinois Constitution
and Illinois Supreme Court Rule 382

PETITION FOR REHEARING OF THE GARDNER INTERVENORS

WILLIAM J. HARTE, LTD.
111 West Washington Street
Suite 1100
Chicago, IL 60602
One of the Attorneys for the
Gardner
Intervenors

Of Counsel:

WILLIAM J. HARTE
ROBERT L. TUCKER
JOSEPH E. TIGHE
STEPHEN L. GARCIA
COURTNEY C. NOTTAGE

No. 72662

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ROLAND W. BURRIS, ILLINOIS ATTORNEY GENERAL,	)
Plaintiff,	)
JOSEPH GARDNER, *et al.*,	)
Intervenor-Plaintiffs,	)
vs.	)
GEORGE H. RYAN etc., *et al.*,	)
Defendants.)	)

PETITION FOR REHEARING OF
THE GARDNER INTERVENORS

Now come the plaintiff-intervenors, Joseph Gardner, Lovana Jones, Dan Barreiro, William Shephard, Jr., John Lee Johnson, Gwendolyn Scott, Laura Barth, Warren Dorris, Marvin French, Jayme Cain, Percy Conway, Joseph Belman, Luis Albarasin, Crotis Teague, Jr., Henry Landrau, Carolyn Toney, Fred Smith, Charlie Wilson, Jr., Bobby E. Thompson, Jerome Joyce, Jim McPike, Ertharin Cousin and Thomas Lyons, ("the *Gardner* intervenors"), by their counsel, pursuant to Rule 367 of the Rules of the Supreme Court, and respectfully petition this Honorable Court for rehearing in view of the fact that the

majority of the Court apparently overlooked or misapprehended certain points raised by the *Gardner* intervenors. In support thereof, they state the following.

Procedural History Of The Case

The procedural history of the proceedings in this case is stated in the Nature of the Case and the Statement of Facts outlined in the Brief of these intervenors (hereafter "*Gardner* Br.") at pp. 2-3 and 7-10. This 112 page brief was filed the same afternoon the Court announced its decision. The Memorandum of the defendants was filed two days prior on January 8, 1991. In view of the time constraints, the Court may not have had sufficient time to carefully review all of the papers filed by all of the parties.

This seems apparent in the Court's statements that the "tortuous process which we have just experienced is not in the best interests of the voters of this State..." January 14, 1992 Judgment (hereinafter "*Burris II*", p. 2), the "interest of the voters mandates holding elections on time..." (*Id.*, p. 2) and that "any order of this court issued after January 19, 1992, would be too late to establish proper election procedures." (*Id.*, p. 3).

Even accepting the Court's statements in this regard as evidencing a belief of the necessity of an accelerated decision which "in no way" received "an overwhelming acceptance of the plan of the Commission...", (*Id.*, p. 2) an incomprehensible paradox occurred. The Court inexplicably accepted the plan advanced by the persons principally responsible for the "tortured process."

The Court will recall that in its initial December 13, 1991 Opinion (hereinafter "*Burris I*"), the Court, in response to the claim by the *Gardner* intervenors and others that the conduct of the Commission was such as to have created an unconstitutional process, made specific reference to that process (*Burris I*, pp. 1-6) and concluded:

> "[W]e cannot in good conscience approve or disapprove any plan no matter how fair, compact or contiguous and substantially equal the districts have been formed. This court finds that to do otherwise would circumvent the spirit and purpose of the Illinois Constitution." (*Burris I*, p. 11).

The Court set down procedural guidelines which called for an extremely accelerated schedule for filing plans and an "expedited hearing."

The Court also set down substantive guidelines enumerating districts which "do not appear to meet the constitutionally mandated requirements. . ." and directed that specific questions be addressed at the hearing relating to compliance with certain expressed provisions of the Illinois Constitution of 1970.

Specifically, this Court ordered that the following districts be addressed in light of whether they violate Article IV of Section 3 of the Illinois Constitution of 1970, as amended, which provides that all districts be drawn in a compact and contiguous manner: Senate Districts 7, 10, 11, 18, 24, 34, 37, 38, 53 and 54, and House Districts 14, 19, 21, 47, 73 and 75. The Court further directed the Commission to address whether there was a justifiable, neutral reason for any of these configurations. (*Burris I*, p. 12).

This Court further ordered the following districts to be addressed in light of whether they violate the compactness and racial dilution provisions of requirement in Article IV, Section 3, as well as Article III, Section 3, which provides that all elections be free and equal: Senate Districts 6, 36, 44, 51, 52, 56 and 57. The Court also directed the Commission to address whether there was a justifiable, neutral reason for any of these configurations. (*Burris I*, p. 13).

Lastly, the Court ordered that the following districts be addressed as to whether they violate the provision against racial dilution in Article III, Section 3: Senate Districts 21, 29, 33, 39, 42, 43 and 50 and House Districts 6, 8, 10, 25, 26, 27 and 28, 32, 59 and 61 and 62. Significantly, no similar direction was included as to a justifiable, neutral reason for the configuration of these Districts, and in none of the enumerated Senate Districts in Question 3 are there minority populations sufficiently numerous to form more than 50% of the population of a Senate District. (*Burris I*, p. 13).

In the January 14 Judgment, this Court found that the Commission "has complied with the procedural and substantive directives of our December 13, 1991, opinion, and article IV, section 3, of the Illinois Constitution of 1970." (*Burris II*, p. 1). In fact the Commission complied with neither.

I.

IT WAS ENTIRELY UNNECESSARY TO RUSH TO A DECISION ON SUCH IMPORTANT AND FUNDAMENTAL ISSUES.

The most incomprehensible aspect of the Court's Opinion is why the Court felt it necessary to reach a decision in this extraordinarily complex case in just four or five days following the decision of the Commission. (Late Monday afternoon to late Friday afternoon). The Court, in its Opinion, states that "the most important consideration and the underlying thrust of this opinion, is the interest of the voters of this State. . ." which "mandates holding elections on time." (*Burris II*, p. 2). Presumably the Court had in mind the March 17, 1992 Primary. The Court continues: "It is that conclusion and the lack of sufficient budget and time which prevents this court from competently drawing a map that would take into account the diverse interests at stake in this litigation." *Id.*

There were many options open to this Court to accommodate *all* of the interests of *all* the parties. The Commission adopted the Jourdan III Plan, as amended ("Jourdan III A Plan"), on January 6, 1992, purportedly fulfilling its constitutional responsibilities. It was *not* the obligation and responsibility of this Court under the Constitution to select that Plan or the Certain Intervenors II Plan, but to determine whether the Plan adopted by the Commission, which was responsible for the "tortuous process" in the first place, violated the constitutional rights of those presenting "the diverse interests at stake in this Litigation."

The Court had and has now the following options available:

1. The Court can order the Primary and General Elections of 1992 to proceed under the Jourdan III Plan adopted by the Commission, yet retain jurisdiction to do precisely what the Court stated it would desire to do, but for the time and budget constraints, *i.e.*, order an orderly and sensible review of every aspect of the Plan under Supreme Court Rule 382, set the matter for argument, and deliberate every aspect of the Plan in a calm, orderly atmosphere in time for the 1994 elections. Reapportionment litigation occurs in a significant number of instances long after elections have been held in the con-

tested districts. (*See*, for example, *Armour v. State of Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), where a decision was rendered in 1991 concerning a district drawn under the 1981 census). Indeed, in its first redistricting decision under the 1970 Constitution, this Court permitted the 1972 elections to proceed under a constitutionally infirm plan — adopted by this Court as a "provisional" plan — with further proceedings contemplated to develop a constitutional plan. *People ex rel. Scott v. Grivetti*, 50 Ill.2d 156, 277 N.E.2d 881, 888 (1970).

2. The Court can defer final consideration of *any* aspect of the Jourdan III A Plan until after the Primary and General Elections of 1992 to better determine the credibility of the experts and consider more that "the statistics provided" in this case.

3. The Court can defer final consideration of the Jourdan III A Plan and under Supreme Court Rule 382 appoint a sitting or retired judge to hear evidence and make proposed findings of fact and conclusions of law which this Court could review. The budget constraints of this Court would not be affected in any way, other than the time of a single judge.

There are certainly other options open to the Court which would lead to a fair proceeding and yet not impact the Court's concerns over "proper election procedures", giving "candidates enough time to decide whether to run" and "those involved in election process time to prepare", and "voters adequate opportunity to familiarize themselves with their districts and their candidates." (*Burris II*, p. 3). Other options would also allow this Court time to consider the Jourdan III A Plan under the appropriate constitutional standard which was not employed in this case.

II.

THE COMMISSION FAILED TO ACCORD THE PLAINTIFF AND THE INTERVENORS DUE PROCESS UNDER THIS COURT'S PROCEDURAL DIRECTIVES.

The first action of the Commission following the December 13 Opinion was an unsuccessful motion before the federal District Court on December 16, 1991, seeking to enjoin the proceedings before this

Court. (Exhibits A-D hereto). The *Gardner* intervenors thereafter presented a motion before this Court seeking relief from the schedule stated in *Burris I* which was subsequently denied. This brought on another attempt before the federal District Court on December 30, 1991, by the Commission to enjoin the proceedings before this court which again failed. (Transcript of Proceedings, December 30, 1991, attached as Exhibit E hereto).

On December 27, 1991, the Commission held a meeting and, under the guise of an alleged interpretation of this Court's decision, adopted a Special Order (Exhibit F hereto) relative to Rules over the objection of the *Gardner* intervenors, which:

> (1) limited the hearing to two modified statewide plans, one by the Commission and one by the intervenors, thereby foreclosing a hearing to any intervenors who did not agree;
>
> (2) limited the participation of counsel for the intervenors;
>
> (3) limited the hearing to two days of testimony; and
>
> (4) limited the participation of the public in the form of testimony.

On December 30, 1991, the *Gardner* intervenors protested these Rules in the form of a motion before this Court which was also subsequently denied.

Thereafter, the hearing proceeded under the Rules on January 4 and 5, 1992, with deliberation and comment on January 6, 1992, and not surprisingly, the adoption of the Jourdan III A Plan by the Republican majority of the Commission in the later afternoon on January 6. That Plan had been proposed by the Republican majority of the Commission.

On January 6, the *Gardner* intervenors filed a motion with this Court to reject the Jourdan III Plan, as amended, and requested leave to file a brief in five days on Friday, January 10, 1992.

On January 8, 1992, the Commission filed its Memorandum with this Court without leave. It was simply filed.

By the late afternoon of January 10, 1992, the Court had not ruled on the request for leave to file a brief so the *Gardner* intervenors presented a request to file their brief *instanter*. Certain Amici Curiae, traditional African-American public interest groups, also presented motions for leave to file their briefs in opposition to Jourdan III A. That same afternoon, this Court rendered its order adopting Jourdan III A, and, on January 14, the Court handed down its Opinion.

The *Gardner* intervenors had absolutely nothing to do with the "tortious process" employed in these proceedings. The protested the "tortious process" at every opportunity at every level. All they desired was redress from the violation of their rights under the State Constitution. In this regard, the system failed them because of the competing concerns impacting the procedure which resulted directly from the conduct of the Commission. That failure arises to a violation of their constitutional rights under the Due Process Clause of the Constitution of 1970 (Article I. Section 2) and the United States (U.S. Const., 14th Amendment).

III.

THE COMMISSION FAILED TO COMPLY WITH THE COURT'S SUBSTANTIVE DIRECTIVES AND EMPLOYED AN ERRONEOUS STANDARD TO REVIEW THE JOURDAN III A PLAN.

This Court stated in its January 14 Judgment,

> It is well established that the map submitted by the constitutionally mandated Commission is valid unless it is against the manifest weight of the evidence. (Ill. Const. 1970, art. IV, §3(b)). Thus, the parties opposing the map must establish that not only their map or maps are superior, but that the Commission map is against the manifest weight of the evidence.

Judgment, p. 3. It is respectfully submitted that this improperly shifts the burden to plaintiffs and is an improper statement of the standard

of review to be applied to the review of voting rights challenges to statewide plans of apportionment.

Less than one year ago, this Court stated in *Fumarolo v. Chicago Board of Education*, 142 Ill.2d 54, 566 N.E.2d 1283 (1991), that

> When a statute provides for an inequality in voting power, a question arises as to whether there has been a violation of the constitutional guarantee of equal protection of the law. When the means used by a legislature to achieve a legislative goal impinges upon a fundamental right, such as the right to vote, a Court will examine a claim that there was a violation of the constitutional right to equal protection *under a standard of strict scrutiny*.

Fumarolo, 566 N.E.2d at 1291. [Emphasis added.]

Thus, this Court is required to apply a strict scrutiny analysis to the plan adopted by the Commission where the plan is challenged on the basis that it results in an inequality of voting power.

Totally apart from the application of an erroneous standard to review the Commission's product, as indicated above, this Court directed that certain enumerated districts "do not appear to meet the constitutionally mandated requirements" and it expressed certain "questions. . . to be addressed at the hearing. . ." relating *exclusively* to violations of the provisions of the Illinois Constitution, the only claim made by any of the plaintiffs or intervenors in their complaints before this Court. Virtually nothing was done as to the following districts:

1. Waukegan.

Under Jourdan II, portions of Waukegan, Illinois were included in House Districts 59, 61 and 62. This Court expressly included these districts in *Burris I* as violative of Article III, section 3 "which provides that all elections be free and equal. . ." This Court did *not* require a "justifiable, neutral" reason for this racial dilution. (*Burris I*, p. 13). As demonstrated in our Brief, pp. 106-107, (and on the following page), *nothing* was done in these districts between Jourdan II and Jourdan III A. In as far-fetched a statement as can be imagined,

the Defendants' Memorandum stated that the configuration of districts in this area is *somewhat* impacted by the districts to the south which are the result of the creation of minority super-majority districts in Cook County. (Def. Memo., p. 52). The northernmost super-majority minority district in Cook County extends, under the Jourdan III A Plan, no further north than approximately *Belmont Avenue in the City of Chicago.* Between that district (Senator del Valle's Senate District 2 and House Districts 3 and 4) and the lower boundary of House District 59, there are House Districts 20, 33, 34, 15, 17, 16, 18, 58 and 60. It is impossible to even imagine how the northern configuration of Senator del Valle's district could have *any* impact upon the configuration of the Waukegan districts, particularly in view of the large geographic territory covered by House Districts 57, 58 and 60 to the south of House District 59 and by House Districts 60, 51 and 52 to the south and west of the Waukegan area.

The fact is, notwithstanding defendants' rhetoric, that defendants chose to keep House Districts 59, 61 and 62 virtually exactly the same, despite this Court's concerns, because it is defendants' contention that this Court has misinterpreted Article III, Section 3 of the constitution. (See *Gardner* Br., pp. 106-08). Defendants do not agree with this Court's construction of the Illinois Constitution, and they refused to change their redistricting map. They intentionally and arrogantly refused to accommodate these constitutional concerns.

But there is more. The expert employed by the defendants, Richard Engstrom, explained his opinion of an influence district under the Federal Voting Rights Act. [He had none under the Free and Equal Clause which this Court presented.] He stated essentially that minority population should not be fractured where it can be demonstrated that that population, less than 50%, can make the difference as to who will be elected where the two major parties are closely represented. (Engstrom, Tr. 715-17; 891-92; 912-13).

From the "statistics" before this Court, the Jourdan III A Plan creates three "safe" House Districts of 60% or more Republican voters by splitting the minority population in Waukegan into three districts. If the minority population is joined in one District, as in the Certain Intervenors Plan II, there is created one "swing" District of 50% and two "safe" Republican Districts of over 60%. A more blatant example

of racial dilution and political gerrymandering can scarcely be imagined. And the refusal to change the configuration after the directive from this Court establishes that this racial discriminatory conduct is intentional.

2. Aurora.

The Aurora area is encompassed in 2 Senatorial Districts, Senate Districts 21 and 42, both identified in this Court's initial Opinion on the issue of racial dilution. As with Waukegan, contrary to the directions of this Court, there is virtually no change between Jourdan II and Jourdan III A. (See *Gardner* Br., pp. 96-98, and the map on the following page). By splitting the minority population in Aurora between House Districts 42 and 84, in Senate Districts 21 and 42, the Commission created two "safe" Republican House Districts of 55% or more. If the minority population were not fractured to the extent indicated in Jourdan III A, House District 42 would be a "swing" District between the two prominent parties where the minority population would decide the election, consistent with Dr. Engstrom's testimony.

House District 42 under Certain Intervenors Plan II contains 11,153 African-Americans as contrasted with 6,935 African-Americans in the Jourdan III A Plan's House District 42. In addition, Certain Intervenors Plan combines the 11,000 African-Americans in House District 42 with 24,385 Hispanics. Under the Jourdan III A Plan, the concentration of Hispanics is made in a district other than the more heavily concentrated African-American, and the number of Hispanics is more than 4,000 people lower than the concentration of Hispanics offered in House District 42 under Certain Intervenors Plan II.

3. Hispanic Near North Chicago Influence District.

Another example of blatant dilution in the Jourdan III A Plan is House District 33. The Hispanic population there is 39.4%, as opposed to a District 48.56% in the Certain Intervenors Plan.

As originally configured in Jourdan II, Senate District 6, which was the subject of this Court's expressed concern as to compactness and racial dilution, was an "H" shaped district, the western half of which was an Hispanic minority influence House District, while the eastern half was a lakefront House District. Under the Jourdan III A

Plan, the two House Districts have been placed in two separate Senate Districts. The eastern half of the "H" shaped district is joined with a House District immediately to the north, along Lake Michigan, while the western half of the "H" shaped district is also joined with the House District to its north to create a Senate District.

Specifically, Certain Intervenors Plan II joins a minority influence House District which is 48.56% Hispanic (House District 33) with a second House District more than 27.28% Hispanic, creating a Senate District which is 37.9% Hispanic. The Jourdan III A Plan creates a Senate District which is only 32.3% Hispanic. (Ex. 1 before the Commission, Mapes, ¶ 65).

The question then becomes, as this Court stated, whether there exists a "justifiable, neutral" reason for the districts' configurations. Here, defendants employed a strange strategy, leaving the Court to guess at the reasons for the Senate District configuration.

Senate District 6, originally, was an "H" shaped district which paired an Hispanic influence district on the west with a lakefront district on the east. Court's expressed concerns over racial dilution indicate, quite clearly, that the Court's focus was on the treatment of the western, or Hispanic, House District, not on the lakefront district to the east.

When the House Districts were re-paired to make north-south linkages, the Senate Districts were renumbered. The westernmost Hispanic influence district became part of Senate District 17, while the lakefront House District became part of Senate District 6.

Rather than discuss the issue of racial dilution in terms of the Hispanic House and Senate Districts (this Court's concern), defendants' papers discussed racial dilution only as it affects the lakefront, non-minority district. Accordingly, defendants offered a meaningless discussion of the more-than-80% white Senate District which hugs Lake Michigan, with absolutely no discussion of the substantial Hispanic population set forth in Senate District 17.

There is no justifiable, neutral reason which gave rise to the configuration of these House and Senate Districts under the Jourdan III A Plan, as contrasted to House and Senate Districts which can be drawn affording a substantially higher Hispanic population as evidenced under the Certain Intervenors Plan.

4. Senate Districts 56 and 57.

This Court specifically referenced Senate Districts 56 and 57 in Jourdan II as experiencing compactness *and* racial dilution questions. As shown in *Gardner* Brief, pp. 82-88 and the maps on the following pages, the Commission did *nothing* to correct these Districts and gave *no* justifiable, neutral reasons for the configurations as directed by this Court, specifically ignoring the sworn concerns of the minority incumbents in that area.

5. Racial Voting Dilution.

In the four examples indicated above, the Commission ignored this Court's directives in *Burris I*. There are more. But that inaction pales in comparison to the egregious conduct employed against Hispanic and African-American voters in Illinois under the Jourdan III A Plan.

In this case, the Jourdan III A Plan continues to splinter unnecessarily virtually every urban area outside the Chicago metropolitan area which contains a significant minority population. In each instance, over the sworn opposition of respected persons in virtually every such community (*Gardner* Findings 206, 239), both the city and the minority population within the city or town are fractured into two or more districts, effectively eliminating or at least severely impairing the ability of the minority groups within those municipalities to influence elections, notwithstanding the uncontradicted, persistent lingering effects of past and present discrimination which have weakened the political effectiveness of minorities in those communities. (*Gardner* Findings 208-239).

As to the metropolitan Chicago area, a review of the totality of the circumstances compels the conclusion that the Certain Intervenors Plan II more effectively enhances the interests of African-American and Hispanics with respect to political empowerment. Under the Jourdan III A Plan, however, although there are 17 House and 8 Senate Districts in which African-Americans constitute a super-majority of the population, the totality of the circumstances establishes that, in at least 5 of those House Districts and 3 of those Senate Districts, the African-American community can be expected to be unsuccessful in efforts to overcome potential white opposition bloc voting. (*Gardner* Findings 247-259).

Significantly, African-American organizations such as the Chicago Urban League and the Task Force for Black Political Empowerment, as well as Joseph Gardner, Executive Director of PUSH, hardly organizations and individuals who desire anything less than the maximization of African-American political empowerment, are against the Jourdan III A Plan for the City of Chicago. Virtually every African-American elected official in the General Assembly opposes that Plan. And finally, the testimony of the defendants' expert, Dr. Engstrom, both in Affidavit and before the Commission, is entirely unpersuasive and lacking in any reasonable foundation, particularly where he confessed no knowledge or understanding of local Chicago politics, life in the African-American communities, or relative strengths of white and African-American political organizations in the areas affected by the Certain Intervenors Plan II and the Jourdan III Plan. (*Gardner* Findings 260-262). Finally, Dr. Engstrom offered no opinions as to racial dilution under the Free and Equal Clause of the Illinois Constitution. The Jourdan III A Plan achieves the mathematical target of 17 districts by engaging predominately white wards in anticipated primary battles with African-American areas, which themselves often include portions of disparate African-American neighborhoods and wards.

As to the Hispanic Districts, every Hispanic organization, elected official or individual who cared to express an opinion objected to the Jourdan III A Plan in the City of Chicago and downstate. No one, other than Dr. Engstrom, gave testimony, either orally or in writing, in support of the treatment of Hispanics under that Plan. (*Gardner* Findings 138-142, 163).

IV.
THIS COURT COULD NOT HAVE DECIDED THE PARTIES' FEDERAL CLAIMS.

The Commission has asserted in the Federal District Court Action that the federal claims of the *Gardner* Intervenors, indeed of *all* parties before this Court, are subject to the doctrines of *res judicata* and collateral estoppel. (Exhibit G hereto).

This is the result of this Court's reference at page 4 of the Opinion that "the Commission map meets all four requirements", one

of which (No. 2) is "whether the map has provided adequate representation to minorities and other special interests to satisfy various State and United States constitutional rights as well as Federal statutes, *i.e.*, racial, ethnic and gender; . . ." (*Burris II*, p. 4).

Of all that has happened to these parties in this "tortious process", this assertion is the most egregious. For the *Gardner* intervenors to have pleaded only state claims in these proceedings, to have successfully fought removal of those state claims, to have broken their backs to accommodate this Court's first Opinion which enumerated *only* questions relating to state claims, and to have had withdrawn from them the right to place these claims before this Court in an appropriate, sensible procedure, then to go to the federal court where just possibly this appropriate, sensible procedure can be accorded and to be visited with the assertion that the federal claims were either decided or are now precluded raises shame to a new level.

It is apparent to the *Gardner* intervenors that this Court never intended to decide or undertake to decide federal claims for the following reasons:

1. The Standard Applied.

This Court stated in its Opinion that it "did not judge the credibility of each expert, but rather relied on the statistics provided." (*Burris II*, p. 4). This is a totally inappropriate standard for federal claims under the Voting Rights Act and the Fifteenth Amendment.

Under the Voting Rights Act, the Congress of the United States explicitly directed the courts to review the "totality of circumstances" when determining whether racial or language minority members have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1985), embraced and adopted the "totality of circumstances" analysis.

In *Gingles*, the court stated:

> Subsection 2(b) establishes that §2 has been violated where the "totality of circumstances" reveal that "the political process leading to nomination or election. . .are not equally open to participation by members of a [pro-

> tected class]. . .in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 478 U.S. at 43.

In determining whether minority plaintiffs have an equal opportunity to participate in the political process and to elect candidates of their choice,

> a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." [citing the Senate Report which accompanied the 1982 amendments to the Voting Rights Act.] The Senate Report specifies factors which typically may be relevant to a §2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to the public office in the jurisdiction. *Id.*, 28-29; see also *supra*, at 36-37. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.*, at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive.

Gingles, 478 U.S. at 44-45, *supra*.

The Supreme Court, subsequent to *Gingles*, made clear that §2(b) of the Voting Rights Act was intended to apply to influence cases. In *Chisom v. Roemer*, ___ U.S. ___, ___ L.Ed.2d ___, 111 S.Ct. 2354 (1991), the Court construed §2 of the Voting Rights Act in connection with judicial elections. Specifically, the Court construed the language in § 2(b) relating to minorities having "less opportunity than other members of the electorate to participate in the electoral process *and* to elect representatives of their choice." (42 U.S.C. §1973(b) (emphasis added)). The Court, in its majority opinion, held that a plaintiff must prove both a denial of the opportunity to participate and an abridgement of the opportunity to elect representatives of the minorities' choice in order to prevail under §2. 111 S.Ct. at 2365.

In dissent, Justice Scalia criticized that construction, suggesting that "if both conditions must be violated before there is an §2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis elect representatives of their choice' would be entirely without section 2 protection." 111 S.Ct. at 2371 (Scalia, J., dissenting). The majority addressed Justice Scalia's dissent, and, in so doing, put to rest any suggestion that an "influence" case is not cognizable under §2:

> The dissent argues that our literal reading of the word "and" leads to the conclusion that a small minority has no protection against infringements of its right "to participate in the political process" because they will always lack the numbers necessary "to elect its candidate," *Post* at 2371. This argument, however, rests on the erroneous assumption that a small group of voters can never *influence* the outcome of an election.

111 S.Ct. at 2365, n. 24 (emphasis added). That decision of the Supreme Court, issued June 20, 1991, stands as an explicit recognition that "influence" districts are subject to review under the Voting Rights Acts and that minorities in an "influence" district are entitled to protection under federal law. In fact, it is apparent that it was the unanimous view of the Supreme Court that "influence" districts

should be read as cognizable under the Voting Rights Act. The dissent criticized the majority's decision because, in the dissent's view, it might lead to a construction excluding "influence" districts from the scope of the Act, while the majority rejoined by pointing out that the dissent rested on a false premise and that "influence" districts were not excluded by the majority's opinion.

Therefore, where a court considers voting dilution claims under the Voting Rights Act as applied to influence districts, it must consider the totality of circumstances on the basis of objective factors, including the non-exhaustive list of factors set forth in *Gingles*. Because this Court relied only on statistics provided to it in purporting to consider the plans before it under the Voting Rights Act, it failed to apply the correct standard and to consider all of the evidence before it regarding the communities in the challenged districts, as required by *Gingles*.

2. Four Justices Have Not Joined As A Majority On This Issue.

Review of the Concurring Opinion of Justice Heiple indicates expressly *his* reason for joining the majority: "Since I believe that the Jourdan III-A map meets the *Illinois Constitutional guidelines* in a sufficient manner, I support the adoption of the map." (Emphasis added). (*Burris II*, p. 9). The three dissenting Justices cannot be said to have agreed with any conclusion of the majority. Since the federal claims, from the face of the Opinion, failed to have a constitutional majority of four Justices join on this issue, the question cannot be said to have been decided by this Court so as to foreclose its decision in the federal system.

CONCLUSION

For the reasons given, the *Gardner* intervenors respectfully pray that this Court grant the petition for rehearing and address the merits of the grave constitutional issues which confront this Court in this case in a sensible, calm manner without the time constraints the Court has expressed.

Respectfully submitted,

One of the Attorneys for
Gardner Intervenors
WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, IL 60602
(312) 726-5015

JOSEPH E. TIGHE
111 West Washington Street
Chicago, IL 60602
(312) 641-0881

ROBERT L. TUCKER &
ASSOCIATES
203 North LaSalle Street
Chicago, IL 60601
(312) 558-1588

Of Counsel:
WILLIAM J. HARTE
ROBERT L. TUCKER
JOSEPH E. TIGHE
STEPHEN L. GARCIA
COURTNEY C. NOTTAGE